

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES M. FIELDS**

## Claimant

VS.

# KANSAS DISTRICT COUNCIL--ASSEMBLIES OF GOD and ABRASIVE ENGINEERING

## Respondents

AND

**AON RISK SERVICES OF NORTHERN CALIFORNIA and SENTRY INSURANCE**

## Insurance Carriers

Docket No. 248,829

## ORDER

Respondent Kansas District Council—Assemblies of God (hereinafter "AOG") appeals the May 3, 2001, Award of Assistant Director Kenneth J. Hursh. The Board held oral argument in Wichita, Kansas, on November 9, 2001.

## APPEARANCES

Claimant appeared by his attorney, Dennis L. Phelps of Wichita, Kansas. Respondent AOG and its insurance carrier appeared by their attorney, Jeff C. Spahn, Jr., of Wichita, Kansas. Respondent Abrasive Engineering (hereinafter "Abrasive") and its insurance carrier appeared by their attorney Janell Jenkins Foster of Wichita, Kansas.

## RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the Award of the Assistant Director. At oral argument before the Board, the parties stipulated the 22.5 percent permanent partial whole body disability was appropriate for the purposes of this award.

## ISSUES

Did Assistant Director Hursh err by finding that claimant's alleged injuries occurred solely as a result of his employment with AOG? Respondent AOG contends claimant's

original employment with Abrasive caused and/or contributed to claimant's bilateral upper extremity symptoms. Respondent AOG further contends that, if it did cause or contribute to claimant's upper extremity symptoms, respondent is entitled to a credit pursuant to K.S.A. 1997 Supp. 44-501(c) for claimant's preexisting functional impairment resulting from the injuries suffered with Abrasive.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant began working for Abrasive in 1994. His work at Abrasive involved hand-intensive labor, including drilling with a rotary drill, which claimant described as being continuous. Claimant continued performing that work for Abrasive until January 18, 1997, when, after suffering a work-related fall, he injured his right shoulder and underwent rotator cuff surgery with William T. Grant, M.D. Claimant was off work for a couple of weeks following surgery and then returned to work with Abrasive. However, shortly after returning to work with Abrasive, he advised them that he had already accepted a job with Wheat State Camp (a.k.a. AOG) and provided Abrasive with notice of his intent to terminate his employment. Claimant began working for AOG on March 17, 1997.

Claimant testified that, while working for Abrasive, he had suffered hand difficulties, including numbness and tingling bilaterally. Claimant, however, was afraid to request medical treatment for fear of being terminated.

When claimant first started working for AOG, his right arm was in a sling from the rotator cuff surgery. When claimant transferred to AOG, his treatment was also transferred to a Wichita doctor, i.e., J. Mark Melhorn, M.D. Dr. Melhorn first saw claimant on April 3, 1997, at which time he ordered therapy on claimant's right shoulder. In May 1997, while undergoing treatment for the shoulder, claimant commented to Dr. Melhorn about his right hand numbness. Dr. Melhorn injected the right hand, but the injection provided no benefit. Later, claimant underwent nerve conduction studies and, partially based upon those test results, Dr. Melhorn diagnosed bilateral carpal tunnel and bilateral ulnar nerve symptoms in the elbows. Dr. Melhorn last treated claimant on August 4, 1997.

In August 1997, Dr. Melhorn released claimant to full duty with AOG. Claimant's duties at AOG included driving a tractor mower, changing locks, performing mechanical work, light maintenance and lawn work. Claimant regularly used hand and power tools in his job with AOG. This job did require repetitive activities with his hands. Between August 1997 and May 1998, claimant's symptoms continued to worsen in his hands and upper extremities. At Dr. Melhorn's suggestion, claimant contacted board certified orthopedic surgeon Tyrone D. Artz, M.D. Dr. Artz first examined claimant on May 26, 1998. At that time, claimant described intermittent numbness, night awakening and pain in his upper extremities. Claimant advised Dr. Artz his work as a maintenance worker for AOG was causing his symptoms to worsen, including symptoms of night awakening.

Dr. Artz performed a right carpal tunnel release and right ulnar nerve surgery on claimant on June 3, 1998. The same surgery was performed on claimant's left upper extremity on July 29, 1998. After the surgeries, claimant's sensation and discomfort levels improved to the point that he was able to return to work with AOG, ultimately without restriction.

Dr. Artz rated claimant pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He found claimant to have a 21 percent functional impairment to the body as a whole as a result of his upper extremity injuries. Dr. Artz, however, went on to state that, in his opinion, 90 percent of claimant's impairment would be assessed to his previous employer, Abrasive, with 10 percent assessed to AOG. Dr. Artz broke his impairment opinion down even further, specifying that 2.1 percent of claimant's 21 percent functional impairment was attributable to AOG, with 18.9 percent attributable to claimant's earlier work at Abrasive. Dr. Artz testified that his opinion was, in part, based upon information provided to him by claimant, in part, from the employment history and job descriptions provided and, in part, from information provided to him by David S. Wooding, an attorney for AOG.

Dr. Melhorn did not provide a functional impairment rating on claimant, but after reviewing Dr. Artz's 21 percent impairment rating stated that that impairment rating, while being a little high, was not unrealistic. Dr. Melhorn also stated that he felt claimant's impairment was due, in part, to his employment with AOG and, in part, to Abrasive. Dr. Melhorn attributed 70 percent of claimant's functional impairment to Abrasive and the other 30 percent to his employment with AOG.

Claimant was referred to Pedro A. Murati, M.D., board certified physical medicine and rehabilitation specialist, by his attorney. Dr. Murati examined claimant, but provided no treatment. Dr. Murati assessed claimant a 24 percent whole person functional impairment as a result of the injuries suffered with AOG. This rating was pursuant to the AMA Guides, Fourth Edition. Dr. Murati was questioned regarding claimant's preexisting employment with Abrasive and testified that it was possible claimant had a preexisting condition from Abrasive. However, he was not able to base any impairment on claimant's symptomatology and was not provided sufficient medical records from claimant's past employment to opine what, if any, portion of his functional impairment was attributable to his work at Abrasive.

None of the health care providers who examined claimant had the opportunity to examine claimant while he was employed with Abrasive. During that period of time, claimant sought no medical treatment and was provided no medical care for his upper extremity symptoms. Claimant did testify that he had ongoing symptoms in his upper extremities, but, when he first raised the issue with Dr. Melhorn in May of 1997, claimant initially discussed only his right upper extremity. By the July 14, 1997, visit, claimant's complaints included both hands and wrists.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

K.S.A. 1997 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The Kansas Court of Appeals in Hanson v. Logan U.S.D. 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* \_\_\_ Kan. \_\_\_ (2001), discusses the above statute, distinguishing between a preexisting condition and a preexisting disability. In Hanson, the Court noted there was no evidence of the amount of Hanson's preexisting disability, while there was evidence that Hanson had a preexisting condition. The factual situation in Hanson, while somewhat dissimilar to this case, is, at the same time, analogous. The claimant had a preexisting condition while working for Abrasive. There was, however, no evidence that this preexisting condition could be deemed a disability. Claimant, while suffering some symptoms, had sought no medical treatment and was, in no way, restricted from performing his employment duties with Abrasive. Additionally, claimant testified that his condition continued to worsen after leaving Abrasive and going to work for AOG.

The burden of proving a workers' compensation claimant's amount of preexisting impairment as a deduction from a total impairment belongs to the employer and/or its insurance carrier, once claimant has come forward with evidence of aggravation or acceleration of a preexisting condition. Hanson, *supra*, Syl. ¶ 8.

The Board acknowledges that the health care providers, who examined and treated claimant, provided information regarding claimant's preexisting condition. However, the facts are that claimant obtained no treatment, was assessed no functional impairment, and was, in no way, restricted from performing any of his work duties with Abrasive. The Board has held in the past, and continues to hold, that it is critical that a preexisting condition actually constitutes an impairment in that it somehow limits the worker's activities or abilities. Bradford v. Manhattan Mercury/Seaton Publishing Company, WCAB Docket No. 210,583 (June 2000). AOG has failed to prove that claimant had a ratable functional impairment before he began work for it.

The Appeals Board, therefore, affirms the Assistant Director's finding that there was insufficient credible evidence of preexisting impairment to allow a reduction of claimant's permanent impairment pursuant to K.S.A. 1997 Supp. 44-501(c). The Appeal Board, therefore, affirms the Award of Assistant Director Hursh against respondent Kansas District

Council–Assemblies of God and its insurance carrier, AON Risk Services of Northern California, for the accidental injuries sustained through June 3, 1998.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Assistant Director Kenneth J. Hursh, dated May 3, 2001, should be, and is hereby, affirmed, and an award is granted in favor of the claimant, James M. Fields, and against the respondent, Kansas District Council-Assemblies of God, and its insurance carrier, AON Risk Services of Northern California, for the injuries suffered through June 3, 1998, for a 22.5 percent permanent partial disability to the body as a whole.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I agree with the majority that attributing a portion of an impairment rating to preexisting activities is not the same as giving an opinion on preexisting functional impairment under K.S.A. 1997 Supp. 44-501(c). But, in this case, the record goes beyond a mere percentage apportionment of a total rating. Dr. Artz specifically testified that claimant had an 18.9 percent impairment that preexisted his employment at AOG. How he could arrive at this figure under the AMA Guides, Fourth Edition, is unclear. But Dr. Artz was not asked to explain his rating methodology.

In determining whether claimant had a preexisting impairment, the majority places considerable significance on the fact that claimant had no restrictions while employed with

Abrasive. But when Dr. Artz released claimant to return to work with AOG in August 1998, after his surgeries, it was, likewise, with no restrictions. Furthermore, when claimant was first examined by Dr. Artz in May of 1998, he gave a history of upper extremity symptoms for the past two to three years. This places the onset of claimant's symptoms at approximately a year to two years before he began working for AOG in March of 1997. Given this history of symptoms, claimant's work history, the supporting apportionment testimony by Dr. Melhorn and the absence of any persuasive medical opinion to the contrary, I would find that claimant suffered an 18.9 percent impairment from his employment with Abrasive and a 2.1 percent impairment from his work for AOG. The award should be apportioned between the two respondents accordingly.

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**BOARD MEMBER**

- c: Dennis L. Phelps, Attorney for Claimant  
Janell Jenkins Foster, Attorney for Respondent Abrasive Engineering  
Jeff C. Spahn, Jr., Attorney for Respondent AOG  
Nelsonna Potts Barnes, Administrative Law Judge  
Kenneth J. Hursh, Assistant Director  
Philip S. Harness, Director